SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 71

MINE SAFETY APPLIANCES COMPANY,
Appellant,

vs.

JAMES V. FORRESTAL,
Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF ON BEHALF OF APPELLANT

I

In the absence of a statute divesting the District Court of jurisdiction, appellant cannot be required to go to the Court of Claims and appellee is not entitled to assert that appellant should go to that court; the remedy there is not plain, adequate and complete.

We venture to repeat that, upon the basis of the assumption of the unconstitutionality of the statute, appellee's unilateral order is void; the appellant owes nothing, and not having paid anything, there exists no valid reason for

requiring it to sue to recover in any other forum, particularly in a legislative tribunal, in order to permit the assertion of a set-off which is presumably void.

The reasoning of Mr. Justice Cardozo, speaking for the dissenting Justices, in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, at p. 338, is quite apposite here:

> "If the whole statute were a nullity, the complainants would be at liberty to stay the hand of the tax-gatherer threatening to collect the penalty, for collection in such circumstances would be a trespass, an illegal and forbidden act. (Citing cases). It would be no answer to say that the complainants might avert the penalty by declaring themselves code members (§ 3) and fighting the statute afterwards. In the circumstances supposed there would be no power in the national government to put that constraint upon them. The Act by hypothesis being void in all its parts as a regulatory measure, the complainants might stand their ground, refuse to sign anything, and resist the onslaught of the collector as the aggression of a trespasser."

In the light of the allegations of the complaint (Pars. 22 and 24, R. 9-10) that contracts which were not within the statute, were included in renegotiable business, the language of *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, at p. 510, is in point:

> "This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force."

To the same effect is *Ogden City* v. *Armstrong*, 168 U. S. 224 (1897).

We submit that appellee cannot oust the jurisdiction of a constitutional court, in this action against him, by asserting that appellant should be required to go into the Court of Claims, a legislative court which may be abolished tomorrow *Maricopa County, Arizona,* v. *Valley National Bank of Phoenix,* 318 U. S. 357 (1943); *United States* v. *60,000 Square Feet of Land and Eight-story Hotel Thereon Known as Oakland Hotel,* 53 F. Supp. 767 (D. C. Cal.) (1943)) in an action against another party, the United States.

The appellee's unilateral order cannot be collaterally attacked (*Inghram* v. *Stockyards Co.,* 64 F. (2d) 390 (C. C. A. 8th)) and moreover, appellant cannot be compelled to bear the burden of establishing the invalidity of appellee's actions in order to recover funds admittedly due it on its valid and completed contracts: *Smith* v. *Jackson,* 246 U. S. 388 (1918); *Miguel* v. *McCarl,* 291 U. S. 442 (1934); *McCarl* v. *Cox,* 8 F. (2d) 669 (App. D. C.) (1925) (Cert. denied, 270 U. S. 652); *R., F. & P. R. Co.* v. *McCarl,* 62 F. (2d) 203 (App. D. C.) (1932) (Cert. denied, 288 U. S. 615). In *McCarl* v. *Cox, supra,* the Court said at p. 670:

> "Alluding to the contention of the government that the officer had mistaken his legal remedy and should have sued in the Court of Claims, the court [Mare v. Alexander, 2 F. (2d) 895 (D. C., Mass.)] added: 'The answer to this contention is that the Comptroller General has mistaken his remedy. Instead of recovering for the United States the sum deemed to be due by an imperial fiat—let this be done—without hearing the parties in interest, he should have instituted a suit in a court of justice. U. S. v. Olmsted, 118 F. 433, 55 C. C. A. 249. Doubtless it would be convenient if the matter could be settled by the simple process of ordering the disbursing officer to withhold the lieutenant's salary—in the language of the street, "docking his pay"; but no such arbitrary power has been invested in the Comptroller General by this new legislation. As Judge Clay-

> ton emphatically remarks: "There cannot be such an autocrat. Our government cannot be reduced to a bureaucracy."

We also call attention to the language of *R., F. & P. R. Co.* v. *McCarl, supra,* at p. 207, where that Court said:

> "And so, in like manner, we think the suggestion of resort to the Court of Claims by appellant without merit. The debt to the carrier, as we have seen, is not disputed either as to amount or that it was then due and payable. A judgment of the Court of Claims would therefore merely have established something which is not contested."

To the same effect is *Hines* v. *United States, ex rel. Marsh,* 105 F. (2d) 85 (App. D. C.) (1939).

We also submit that appellee cannot assert that appellant has a remedy elsewhere at law against another party, the United States. The rule is that the adequate remedy must be available against the same person.

Barr v. *Roderick, et al.* (D. C. Cal.), 11 F. (2d) 984, 986 (1925);

Buttinghausen v. *Rappeport* (N. J. Ch.), 24 A. 2d 877, 880 (1942);

Jackson's Admx. & Heirs v. *Turner,* 5 Leigh (32) Va. 119, 125 (1834);

Thorn & Hunkins Lime & Cement Co. v. *Citizens' Bank of St. Louis,* 158 Mo. 272 (1900).

The contradictory nature of appellee's contentions in this respect is apparent. On the one hand he asserts that as to the amount he threatens to withhold, there is no remedy in the constitutional courts because, in effect, the suit is one against the United States, which has not consented to be sued, and hence the Court is without jurisdiction. This, of course, ignores the threat to order withholding from appellant's subcontractors. On the other hand,

appellee asserts appellant may avoid this difficulty by suing on its contracts for goods sold and delivered to the United States, in a legislative court, the Court of Claims, to recover the amount withheld from these contracts. If appellee's position be accepted, and we submit it should not be, then the United States has not consented to be sued anywhere and this obstacle cannot be circumvented, we submit, by an indirect attack by appellant on the unilateral order through the device of suing on the contracts on which appellee threatens to withhold amounts otherwise due appellant. Of course suit could not be brought in the Court of Claims on appellant's subcontracts because these are not with the United States. Furthermore, such a suit would no doubt be met with the defense that the provisions of the Renegotiation Act conferring exclusive jurisdiction in the Tax Court to finally determine the amount, if any, of excessive profits and providing that such determination shall not be reviewed or redetermined by any other court or agency, constitutes, in effect, a withdrawal of the consent of the United States to be sued for the recovery of monies so illegally withheld.

In addition, the Court of Claims has put appellant on notice that it will assume the constitutionality of the statute here involved because it held in *State of Alabama* v. *United States*, 38 F. (2d) 897 at p. 900 (1930) (Results affirmed, 282 U. S. 502, on ground court was without jurisdiction of cause of action):

> "Fifth. That where Congress has passed a statute authorizing the doing of a certain thing and the creation of a certain agency and given full authority to the executive to accomplish that purpose, and thus expressed its opinion of its constitutional right so to do, this Court will not undertake to deny the constitutionality of its action."

It is also submitted that interest not being recoverable in the Court of Claims (Judicial Code, Section 177, 28 U. S. C. 284), the remedy in that Court is inadequate. *Educational Films Co.* v. *Ward*, 282 U. S. 379 (1931). There this Court said at p. 386:

> "The equity jurisdiction to enjoin collection of the tax is not challenged. The legal remedy provided by the statute for the recovery of taxes after payment falls short of adequacy in at least two respects. Refund, if any, is expressly without interest. § 219 (d). (Citing cases) * * * But it is at least doubtful whether any refund can be compelled."

To the same effect are *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393 (1928) and *State of California* v. *Latimer*, 305 U. S. 255 (1938).

At the time the complaint in this case was filed, there was no possibility of a refund and even now there is no certainty in this case of a refund. True, the First Deficiency Appropriation Act of 1945, approved April 25, 1945 (Public Law 40—79th Congress) provides an appropriation of $15,000,000.00 for "Refunds under Renegotiation Act",[1] but there

[1] Refunds under Renegotiation Act: There is hereby appropriated, to remain available until June 30, 1946, such amount not exceeding $15,000,000.00 as may be necessary to make the refunds, including refunds for prior years, required by section 403 (a) (4) (D) (relating to the recomputation of the amortization deduction) and by the last sentence of section 403 (i) (3) (relating to excess inventories) of the Renegotiation Act; and to refund any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity: Provided, That to the extent refunds are made from this appropriation of excessive profits collected under the Renegotiation Act and retained by the Reconstruction Finance Corporation or any of its subsidiaries the Reconstruction Finance Corporation or the appropriate subsidiary shall reimburse this appropriation: Provided further, That the War Contracts Price Adjustment Board or its duly authorized representative shall certify the amount of any refund to be made in pursuance hereof to the Secretary of the Treasury, who shall make payment upon such certificate in lieu of any voucher which might otherwise be required.

is no statute authorizing a refund. Certainly the meaning of this statute is uncertain and vague, to say the least. What does "erroneously collected" mean? Who is to decide whether there is to be a refund? Is the amount provided sufficient to cover all possible refunds? Will a proceeding in the Court of Claims be concluded by June 30, 1946? The United States has two years within which to apply for a new trial in the Court of Claims. (Act of March 3, 1911, 36 Stat. 1141, 28 U. S. C. 282). Legal interest is not provided for, and in fact payment of interest up to 4% is discretionary with someone who is not designated. This appropriation lapses June 30, 1946, and with about 300 cases pending in The Tax Court alone, a refund for appellant is, at least, uncertain. It is submitted that the language of this Court in *Graves* v. *Texas Company*, 298 U. S. 393 (1936) is controlling here. There this Court said at p. 402:

> "Appellants intimate, but do not definitely claim, that a distributor or dealer, if illegally compelled to pay taxes on sales to the United States, would under Alabama law be entitled to recover the amount so collected. They cite the Act of September 9, 1927, Gen. Acts 1927, p. 635. It appears to extend only to taxes paid while their amount or validity is in litigation. It contains no provision for interest. It was in effect when the attorney general made his ruling of November 22, 1928. They also cite the Act of July 17, 1931, Gen. Acts 1931, p. 527. It does not permit suit but merely authorizes the tax commission to refund. And finally they cite the Act of July 10, 1935. Section 379 gives to one who has paid taxes under protest the privilege of bringing suit within 60 days against the officer making the collection; it directs the court to determine what amount, if any, is excessive or illegal and to order it to be returned with interest by the State or its agencies receiving the same. Failure to sue within the specified period bars the claim. It is likely that a year or more would elapse before final determination of such a suit. In the meantime, monthly collections

would have to be made, and so appellee would be compelled repeatedly, and at least as often as once every sixty days, to bring suits against the commission involving the same question. Upon obtaining the court's determination in its favor, appellee would be authorized, on presentation of certified copies of the judgment, to receive from the State the half it retained and from each of the counties its share of the other half. It would be necessary to follow the same course as to the amounts claimed in each of the suits. Resort may be had to equity in order to avoid the multiplicity of suits necessarily involved in the procedure prescribed for recovery of illegal exactions.

"Appellee suggests that the provisions of the Act of July 10, 1935, are repugnant to § 14 of the Constitution of Alabama: 'That the State of Alabama shall never be made a defendant in any court of law or equity.' In support of that view, it shows that, since this suit was commenced, a telephone company brought suit under § 379 in the court below against the members of the state commission, appellants here, to recover license taxes paid under protest, and that they have filed a plea to the jurisdiction of the court, asserting that 'the real party in interest is the State of Alabama;' that § 379 purports to give the State's consent to be sued only in its own courts, and that it 'is immune from being impleaded in a court of the United States under the provisions of the Eleventh Amendment.'

"It sufficiently appears that appellee had no plain, adequate or complete remedy at law."

It is further submitted that even granting the certainty of a refund, under this statute which was enacted over a year after this action was instituted, this does not oust the equitable jurisdiction of the court. In *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, under analogous

circumstances, the late Mr. Justice Brandeis, speaking for this Court said at page 296:

> "Nor is the equitable jurisdiction lost because since the filing of the bill, an adequate legal remedy may have become available."

It is submitted that the threatened action of appellee in the case at bar is tortious, the liability individual (*Reconstruction Finance Corp.* v. *J. G. Menihan Co.*, 312 U. S. 81 (1941), and as the Court of Claims only has jurisdiction over claims arising out of contracts express or implied in fact, of the United States, *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212 (1926)); *State of Alabama* v. *United States*, 282 U. S. 502 (1931), it is without jurisdiction over appellant's claim for the amounts involved in appellee's threatened trespass. *United States* v. *Goltra*, 312 U. S. 203 (1941); *United States* v. *North American T. & T. Co.*, 253 U. S. 330 (1920). It requires a statute for the recovery against the United States of taxes illegally collected by a Collector of Internal Revenue: *Hammond-Knowlton* v. *United States*, 121 F. (2d) 192 (C. C. A. 2d) (1941) (Cert. denied, 314 U. S. 694). Without such a statute, action against the Collector is the only remedy because the liability for the illegal exaction of taxes is personal and the United States has not consented to be sued: *Nicholl* v. *United States*, 7 Wallace 122 (1869); *Graham* v. *Goodcell*, 282 U. S. 409 (1931). Certainly a Collector cannot successfully maintain that a taxpayer should be forced into the Court of Claims, although the right to sue the United States now exists. A patent infringing government officer or contractor could not have so contended prior to the Act of July 1, 1918, 40 Stat. 705, 35 U. S. C. H 68, as his infringement was personal and subject to an injunction although the United States got the benefit of

his wrongdoing. *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331 (1928).

We submit, the inevitable logic of the cases beginning with *Sloan Shipyards Corp.* v. *U. S. Shipping Board,* 258 U. S. 549 (1922) and ending with *Brady* v. *Roosevelt Steamship Co.,* 317 U. S. 575 (1943), is: that where a government agent, individual or corporate, is subject to be sued, as the individual is here (although an alternative remedy may exist against the United States, unless Congress expressly makes that alternative remedy exclusive) the agent cannot escape liability for his wrongdoing, in a suit against him by asserting that liability exists in another.

We submit, the foregoing demonstrates beyond successful contradiction, that it cannot be held here that the remedy in the Court of Claims is plain, adequate and complete, which is the test for the ousting of equity jurisdiction. *American Life Insurance Co.* v. *Stewart,* 300 U. S. 203 (1937); *Davis* v. *Wakelee,* 156 U. S. 680 (1895); *Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282 (1916).

II

The Brief of Appellee

This is not a suit to enjoin appellee as Secretary of the Navy, as the brief of appellee reiterates. It is and has been from its inception, a suit against the individual defendant to enjoin him from committing a trespass against appellant's vested property rights and for a declaratory judgment to the same effect.

Appellant did not aver, as appellee states* (pp. 6 and 22), as additional grounds for relief "that appellant realized no excessive profits in 1941 and 1942" or "that the Secretary's renegotiation order is in error in finding that

* References are to pages of appellee's brief unless otherwise indicated.

appellant had realized any excessive profits * * *." These statements are contrary to the record. *Appellant asked no such relief and is not contesting here, and did not so contest in the Court below, the amount from a factual standpoint of appellee's unilateral determination.* Appellant has consistently contended that appelle's unilateral order is void, as a matter of law and in addition that he included as renegotiable business in arriving at the amount of his unilateral determination, contracts which were not within the statute. Appellee has lifted out of its context a portion of a sentence in paragraph 26 of the Complaint (R. 11) which, in full, is as follows:

> "26. Since the inception of renegotiation proceeding, plaintiff has insisted that neither factually nor legally is there a basis for a determination by defendants or their subordinates of excessive profits for 1941 or 1942 on its business, and that the Renegotiation Act is unconstitutional."

It is plain, we submit, that the foregoing language has but one meaning, namely, that appellant has protested the renegotiation proceeding from its inception. In any event, it has been plain from the beginning of this case that appellant is standing solely on legal grounds.

We also venture to point out that in quoting the prayers for relief, appellee has omitted to state that the complaint contained a prayer for general relief. Furthermore, the nature of the relief prayed for is immaterial on a motion to dismiss because the question then is whether the complaint is entitled to any relief. This is elementary, says the Court in *Morris & Co.* v. *National Association of Stationers, etc.*, 40 F. (2d) 620 (C. C. A. 7th) (1930). To the same effect is *Smith* v. *Buckeye Incubator Co.*, 2 F. R. D. 134 (1940).

Appellee states, p. 10:

> "By stipulation between the parties the elimination of appellant's excessive profits under the Secretary's order is being effectuated solely by withholding from appellant an equivalent amount of monies otherwise due it from the United States under contracts"

and at p. 12:

> "By stipulation with appellant, the Secretary has confined himself to the second method and has caused the net amount of the excessive profits, as determined in his order of March 4, 1944, to be withheld from appellant out of amounts otherwise due on certain of its contracts with the United States."

Appellee bound himself to do nothing to enforce his unilateral order of March 4, 1944, by the stipulation. It was not until June 12, 1944, when appellee filed his answer that appellant had an intimation that appellee would confine himself to withholding the amount covered by appellant's vouchers and not until December, 1944, that appellee definitely took such a position.

This characterization of the Stipulation is contrary to the plain language of the document. Of course, appellant did not so stipulate. The Stipulation is nothing but in effect a pledge with appellee as pledgee of appellant's vouchers, which are now due it, but on which payment was suspended with the consent of appellant as security for the payment of a liability, if any, "pending the final determination of this action" by the Court of last resort (Par. 1: R. 17-18). It is to be noted that the stipulation, paragraph 4 (R. 19), expressly provides:

> "4. By entering into this stipulation neither of the parties hereto make or shall be deemed to make, any admissions with regard to their rights or claims, it being understood by the parties hereto that this agree-

ment shall be without prejudice to their substantive rights."

Appellee's argument as to the exclusive jurisdiction of the Tax Court is based upon a fallacious premise, namely, an assumption that the Tax Court provision of the Renegotiation statute is constitutional. The argument is that the Tax Court affords due process, which necessarily assumes a constitutional issue. As we understand the restrictions of the Order of this Court, we are not permitted to argue constitutional issues in advance of a determination of those issues by the Court below. We contended below and would so contend here, if permitted, that the Tax Court provision is unconstitutional for various reasons. We submit that appellee's argument conveniently ignores the constitutional limitations. If the argument now made by appellee is to be considered by this Court, we earnestly urge that we be permitted to argue the constitutional defects of the Tax Court provisions of the statute.

If the renegotiation feature of the statute alone be assumed to be unconstitutional, this assumption necessarily results in the conclusion that appellee's unilateral order is void and appellant owes nothing and that there is therefore no reason to go to the Tax Court to ascertain this fact for the second time. Appellee is a trespasser in attempting to enforce his void unilateral order, as a matter of law. If the statute as a whole be assumed to be unconstitutional, which is the basis upon which this case is presently to be argued, then the Tax Court provision drops entirely out of the case.

Appellee states (p. 15):

> "Whether a decision by the Tax Court is judicially reviewable, and what issues, if any, would be foreclosed by its judgment, is not before this Court or pertinent to a consideration of the instant case."

We have looked in vain throughout appellee's brief for any authority to support such an unsound principle of law. This contention is not only contrary to fundamental principles of justice; contrary to numerous decisions of this Court, but as well, contrary to the advice given the Senate Finance Committee by the learned Assistant Attorney General who argued this case in the Court below. At pp. 1036-1037 and 1041-1045 (Hearings before the Committee on Finance, Revenue Act of 1943, United States Senate, 78th Congress, First Session, on H. R. 3687), he plainly advised that Committee that the Tax Court provision very probably was unconstitutional, as a denial of due process. Nothing is to be gained by a consideration of the meager and incomplete legislative history of the statute, quoted by appellee pp. 16-18, because the meaning of the statute is plain. The statute plainly makes the determinations of the Tax Court final and conclusive and specifically denies the right of judicial review on such questions as are provided to be within the jurisdiction of the Tax Court, although such questions may involved, as they do here, the repudiation of valid contracts, the taking of appellant's property, and the delegation to executive officers of the right to repudiate existing valid contracts and to pay for the property covered by these contracts, such prices as they, in their uncontrolled opinions, see fit. This, of course, is in the teeth of such decisions as *United States* v. *New River Collieries Co.*, 262 U. S. 341 (1922), and *United States* v. *Bethlehem Steel Corporation, et al.*, 315 U. S. 289 (1942).

However since appellee places some reliance on the views of Congressman Disney, we venture to quote him (89 Congressional Record 10026 at 10251) "I do not believe there is a lawyer in this house but will agree that the retroactive application of existing law is unconstitutional."

The cases cited by appellee at p. 20, are no doubt familiar to this Court. *Pittsburgh & C. Ry.* v. *Board of Public*

Works, 172 U. S. 32; *First National Bank* v. *Weld County*, 264 U. S. 450, and *Gorham Mfg. Co.* v. *State Tax Commission*, 266 U. S. 265, are tax cases involving excessive assessments and with a statute providing for a court review, and as is pointed out in *Pittsburgh & C. Ry.* v. *Board of Public Works, supra*, at p. 39, a court of equity will not ordinarily enjoin in a tax case because of the settled public policy of not interfering with the collection of revenue.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210, and *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, were railroad rate cases. However, in *Prentis* v. *Atlantic Coast Line, supra*, at p. 231, the late Mr. Justice Holmes pointed out:

> "If the state has bound itself by contract not to cut down the rates as contemplated, there would seem to be no reason why the suit should not be entertained now."

The bills in equity were retained in that case to await the outcome of an appeal to the State court on the basis of comity.

Peterson Baking Co. v. *Bryan*, 290 U. S. 570, involved a state regulation of bakers which, it was claimed, was unreasonable, a fact question, but the Court nevertheless passed upon the constitutional questions. *Porter* v. *Investors Syndicate*, 286 U. S. 461, involved the revocation of a permit under a State Blue Sky Law which authorized a court proceeding to set aside the order, but this Court said at p. 471:

> "But where either the plain provisions of the statute * * * or the decisions of the state courts interpreting the act * * * precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal juris-

diction exist, recourse to a federal court of equity is justified."

The language is apposite here because the Renegotiation Act plainly (Section 403(e)(1)) precludes a stay of appellee's unilateral order and once appellant's funds go into the Treasury, it is without a remedy as the statute does not provide for a refund and we have been unable to find any authority for a refund by implication, as suggested by appellee (footnote 35).

Numerous cases are cited at p. 21 for the proposition that a failure to proceed in the Tax Court bars appellant. We have examined these cases with care and we submit, that instead of supporting the above stated proposition, they support our contention that the Tax Court provision is unconstitutional because it fails to provide standards and for judicial review.

Thus this Court says in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 at 48:

> "The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the ap-

propriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.

"As was said in National Labor Relations Bd. v. Jones & L. Steel Corp., 301 U. S. 1, 46, 47, the procedural provisions 'do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91. The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation.'"

The Court will look in vain through this statute for any provision even approximating such safeguards.

Newport News Co. v. *Schauffler*, 303 U. S. 54, is decided on the basis of the *Myers* case.

In *State of California* v. *Latimer*, 305 U. S. 255 (1938), the Board could not enforce its orders except by resort to legal proceedings.

In *Federal Power Commission* v. *Metropolitan Edison*, 304 U. S. 375, the Commission had to apply to Court to enforce its orders for the production of books, etc.

In *Petroleum-Exploration Co.* v. *Public Service Commission*, 304 U. S. 209, the statute contained "detailed provisions for hearings and judicial review" (p. 223).

In *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, the appellant there was not a party to the proceeding in the Court below, but this Court pointed out (p. 310) that if the Commission had refused to suspend the operation of penalties, resort to the courts would have been justified.

Miles Laboratories v. *Federal Trade Commission*, 140 F. (2d) 683, Cert. denied Feb. 26, 1945, is of no help here because the orders of the Commission are subject to court review.

The argument of appellee (pp. 22 and 24) that had appellant gone to the Tax Court that Court might have found that appellant realized no excessive profits at all or might have fixed such profits at an amount which appellant would have been willing to refund, entirely overlooks the fact that appellant is not complaining about the amount from a factual standpoint. It also overlooks the constitutional objections, one of which is that the Tax Court is given an unbridled administrative discretion to determine excessive profits according to their individual opinions, without any standards, and in addition, the Tax Court may "finally" "increase" the amount, and review of such a finding is forbidden. (Section 403(e)(1).)

We know of no case requiring a further administrative proceeding under such circumstances and we further submit, that if it were compulsory to exhaust such a procedure, the statute would be unconstitutional.

Moreover, if by a remote chance the amount is lowered, what benefit is that to appellant, if in the meantime its

funds go into the Treasury with no statutory provision for a refund or interest? Of course appellant is not to be compelled, if its constitutional rights are to be protected, to take any such risk where the right to judicial review is absolutely forbidden. We are not aware of any inherent right of judicial review as appellee argues. As we understand the law, if a statute taking property rights does not provide for judicial review, it is unconstitutional and an order thereunder is subject to injunctive restraint, which is exactly what we are seeking here.

We fail to see the relevancy of *Blair v. Oesterlein*, 275 U. S. 220, in the case at bar. As appellee states, the question in that case was as to the jurisdiction of the Court of Claims in a tax refund case. The controversy was over a special assessment which the Commissioner of Internal Revenue was authorized to grant or refuse under the Revenue Act of 1918 and which was committed by the statute to his sole discretion. If the Commissioner saw fit not to grant relief to the taxpayer, that was the end of the matter, at least in the absence of fraud or other irregularities. The same observating applies to *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551 and *Heiner v. Diamond Alkali Co.*, 288 U. S. 502. *United States v. Henry Prentiss & Co.*, 288 U. S. 73. The taxpayer was not entitled to relief as a matter of right. The taxpayer must depend on government grace for such concessions and necessarily takes them with all annexed conditions. Such a situation is a far cry from the arbitrary taking of property from citizens on contracts entered into years before the enactment of a statute, which, in part, is the situation here.

We also venture to quote the late Mr. Justice Brandeis in answer to the elaborate argument made by appellee on the supposed necessity of preserving uniformity, and hence the requirement of resort to the Tax Court. In *Great*

Northern Railway v. *Merchants Elevator Co.*, 259 U. S. 285 (1922), that learned Justice said for this Court at p. 290:

> "The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests, in the main, upon the following argument. The purpose of the Act to Regulate Commerce is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or Federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity the true construction must, in case of dispute, be determined by the Commission.
>
> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute."

In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, Mr. Justice Brandeis said for this Court, at p. 562:

> "But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

We might also add that it does not require any special skill to determine the dates of contracts, the dates of deliveries

thereunder, and whether they had been paid for prior to April 28, 1942.

At pp. 27-28, appellee's argument reverts to the contention that the Tax Court provision is constitutional. Contentions that Congress did not exceed its authority nor provided a defective remedy are obviously constitutional issues. We are precluded from arguing constitutional issues, but our silence on many of such points urged by appellee is not to be construed as an admission of their validity.

Rather belatedly and somewhat vaguely, appellee concedes (p. 34) the constitutional defects in the Tax Court provision of the Renegotiation statute. We do not concur, however, in the view that the separability clause in the statute "* * * in effect announces that the Tax Court determination shall be final and reviewable only to the extent the Constitution permits it." This view suggests judicial legislation. It is another way of saying that the statute is fatally defective constitutionally, but it can be rescued by reading into it an inherent right of judicial review instead of recognizing the well-settled principle that without the right of judicial review, the statute here is unconstitutional.

We also submit that appellee's concession (p. 34) "Furthermore, it [the Tax Court's determination] does not apply to any other issues as to which a person aggrieved by a renegotiation order may constitutionally be entitled to a judicial hearing" plus the concession at 27-28, admits what we are contending for. What would we ascertain by going to the Tax Court, as we are not contesting from a factual standpoint the unilateral finding on the amount of excessive profits? Should we go there to have it tell us it has no jurisdiction to pass on constitutional issues? We think this is for a Court. Further elaboration on this point will be found in our main brief, pp. 29-37.

We find nothing in *St. Louis-San Francisco Railway Co.* v. *Alabama Public Service Commission*, 279 U. S. 560; *Lawrence v. St. Louis-S. F. Ry. Co.*, 274 U. S. 588; and *Locketry* v. *Phillips*, 319 U. S. 182 (p. 35), to sustain the proposition that by going to the Tax Court appellant may not be held to have waived its constitutional right of judicial review. Furthermore, we repeat, we are not raising any issue as to any matter within the jurisdiction of the Tax Court.

The Renegotiation Act is not, by any stretch of the imagination, a regulatory act as appellee argues (p. 36). It is a price-fixing statute under which the Congress has attempted to delegate to executive officers the right to finally and conclusively say what, in their unrestrained opinions, shall be paid for appellant's property, and this without regard to whether the property was acquired by contracts entered into long before the Act and without any standards of any nature. Again a constitutional issue is injected because, we submit that the statute is in the teeth of numerous cases in this Court. In *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349, where this Court reviewed many of the cases it said at p. 368:

> "Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause." [Just compensation clause.]

The language of this Court in *Bowles* v. *Willingham*, 321 U. S. 503 at p. 514:

> "There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases"

very aptly describes the 1942 Renegotiation Act. In *United States* v. *Bethlehem Steel Corp. et al.*, 315 U. S. 289, this Court, in effect, held such a statute was void.

The right to just compensation is guaranteed to appellant by the Fifth Amendment, and this includes full legal interest as damages, and is a matter for judicial and not for final executive determination. A refund is not the equivalent of this constitutional right. Here the language of *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 at 489, is quite in point:

> "Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. * * * (Citing cases.) And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking. * * * (Citing cases.)
>
> "The Congress recognized this duty in authorizing the expropriation. The Act of June 15, 1917, under which the requisition was made, provided for the payment of just compensation. The Congress did not attempt to give to any officer or administrative tribunal the final authority to determine the amount of such compensation and recovery by suit against the United States was made an integral part of the legislative plan of fulfilling the constitutional requirement."

The same result obtains if the problem is approached from the standpoint of a repudiation of appellant's contracts. The appellee ignores the fact that a substantial part of the property involved in the so-called renegotiation proceeding, in this case, was acquired by the United States under contracts entered into in 1940, 1941 and 1942, prior to the date of the statute and the amendments thereto, and in material part, not within the statute at all, because

the contracts were completed and paid for prior to the date of the statute (R., 9-10).

Crozier v. *Krupp*, 224 U. S. 290, and *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, are cited for the proposition (note, p. 39) that in determining jurisdiction the Court may take into consideration all the facts properly before the Court. These cases do not so decide. Neither was decided on a motion to dismiss. This Court held in *Polk Co.* v. *Glover*, 305 U. S. 5, that a motion to dismiss must be decided upon the basis of the facts averred in the complaint and that the answer and affidavits could not be considered. In the *Crozier* case, a statute was passed pending the disposition of the case, taking the patent under the power of eminent domain and vesting exclusive jurisdiction in the Court of Claims to determine the question of just compensation. This is hardly parallel on its facts to the case at bar. A similar result obtained in the *Alaska S. S. Co.* case where a statute was passed after the litigation was instituted rendering the controversy moot. These cases do not even remotely touch upon the question of what facts are to be considered in passing upon a motion to dismiss, which is the question here. In *Gibbs* v. *Buck*, 307 U. S. 66, this Court said at p. 76:

> "The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill."

A case directly in point is *Magruder* v. *Water Users' Association*, 219 F. 72 (C. C. A. 8th) (1914), where that Court said at p. 78:

> "Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such

as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts. If the acts of the defendants done and threatened were authorized by law; they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts. It is a suit to enjoin officers of the United States from unlawfully interfering with and diverting its water from those persons lawfully receiving and entitled to receive it, from unlawfully preventing the United States from discharging its duties and performing its contracts, to the irreparable injury of the plaintiff and its shareholders. That an executive officer is committing or about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is a good cause of action against such officer for injunctive relief. A suit against him for such a cause is neither a suit against the United States nor is it, or the injunction against such acts of the officer, objectionable either on the ground that it interferes with the property of the United States, or its possession, or compels the specific performance of its contracts by the latter." (Citing numerous cases.)

The appellee urges that appellant has an adequate remedy at law in the Court of Claims. The rule is that appellant must have a plain, adequate and complete remedy at law. Whether this comprehends a proceeding in the

Court of Claims is questionable. Appellee has doubts about the validity of this proposition because at p. 27 he states:

> "And it is by no means clear that if denied relief here, appellant may not obtain it in the Court of Claims."

The attempt to use *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (p. 41), as supporting the contention that appellant has a remedy at law is a bit novel. In that case, this Court dismissed a proceeding in equity for an injunction, involving one plaintiff and one defendant, on the ground that there was no case or controversy, that plaintiff there was seeking merely an advisory opinion, that plaintiff, a licensor of a patent, having sued the licensee for the royalty at law if defendant plead the Royalty Adjustment Act of 1942 as a defense, the constitutionality could be there determined. If the licensee paid the Government and the statute was declared unconstitutional, obviously the licensor was not hurt because it could always recover on its contract with the licensee. Moreover, the statute provided a remedy against the United States in the Court of Claims and, what is more important prohibited the licensor from proceeding elsewhere, while guaranteeing just compensation and not such an amount as in the opinion of executive officers should be allowed. In addition, this Court pointed out that if appellee there was not enjoined, there was no complaint that it would pay the royalties involved into the Treasury. In the case at bar, the appellee is bound to do this by the statute (Section 403(c)(2)).

A serious misstatement occurs at p. 43 of appellee's brief, where it is stated:

> "The renegotiation order of March 4, 1944 was issued by him [appellee] as Under Secretary of the Navy pursuant to an Act of Congress (R. 5-6) and his direc-

> tion to the Treasurer of the United States to withhold from appellant monies in the Treasury which would otherwise be due from the United States were obeyed because Forrestal was acting as a Federal official, with statutory authority to hold up payments out of the United States Treasury."

The same erroneous statement is, in effect, made on p. 44.

No such directions were given by this appellee so far as this record shows and we do not understand appellee to say that he violated the stipulation which plainly provides (Paragraph 2, R. 17-18) that upon the deposit by appellant of its vouchers as security—

> "In all other respects defendants will cause to be stayed action to eliminate said amount of excessive profits pending the final determination of this action by the Court of last resort, and in particular will take no action to enforce the terms of said determination of March 4, 1944 referred to in Paragraph 1."

The use of *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 and *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 and *Smith* v. *Reeves*, 178 U. S. 436 by appellee (pp. 46 and 48) demonstrates how far afield appellee has gone in search for a semblance of authority for his position. As this Court points out in its opinion in the *Read* case, p. 50, and in the *Ford* case, these cases are suits for refunds against State officers in their official capacities under statutes prescribing the terms upon which the States agreed to be sued. Sovereign immunity could not have been claimed for individual wrongdoing. This Court held that the consent to be sued was not broad enough to include suits in the Federal Court. Certainly these cases are not authority for the proposition that the case at bar is a suit against the United States.

The use of the language (pp. 46-47) from *Goltra* v. *Weeks*, 271 U. S. 536 is somewhat astonishing to us. The Court

there said the action of the Circuit Court of Appeals in dismissing a bill granting an injunction enjoining the illegal action of the defendant, Secretary of War, who had seized boats of the plaintiff therein, on the ground that the United States was a necessary party, was in error. The language of the Court is so applicable here, we venture to quote the entire paragraph from which the quotation has been lifted. This Court said at p. 546:

> "The suit [Wells v. Roper, 246 U. S. 335] was a bill in equity to enjoin the Postmaster General from annulling the contract and interfering between the United States and the plaintiff in the performance and execution of the contract. The bill was dismissed on the ground that it was a suit against the United States. That which the bill sought to restrain was not a trespass upon the property of the plaintiff. The automobiles of the plaintiff were not to be taken away from him by the government officer. What the officer was doing was merely exercising the authority entrusted to him by law for the benefit of the government in annulling a contract which involved no change of possession or title to property. To enjoin the officers' action was in effect enforcement by specific performance of a contract against the United States. It was an affirmative remedy sought against the government which though in form merely restrictive of an officer was really mandatory against the sovereign. The difference between an injunction against the illegal seizure of property lawfully posessed and against the cancellation of a contract which involved no change of possession is manifest."

Appellee argues (pp. 44-45) that the effect of the stipulation between the parties was to eliminate the threat of seizure of funds in the hands of appellant's subcontractors. Appellee's contention is, in effect, that if in an injunction proceeding an injunction bond is given to preserve the status

quo, pending the litigation, the need for injunctive relief is thereby eliminated, which, of course, is not the law.

Appellee urges (notes, pp. 42 and 48) that *Educational Films Co.* v. *Ward*, 282 U. S. 379 and *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110 are not in point here because in those cases "the taxpayer was attempting to enjoin collection of money lawfully in his possession." These cases involved injunctions issued against the collection of illegal taxes and in Rickert Rice Mills, the fund, as in this case, the vouchers in effect, was deposited in escrow, subject to the order of this Court. However, although we deny that the case at bar in any way involves the payment of money to appellant, we venture to point out that in *Osborn* v. *Bank*, 9 Wheat. 738 and *Fox* v. *Standard Oil Co.*, 294 U. S. 87, the money was in the hands of officials who were going to turn it into the State treasury unless restrained. In both *R. F. & P.* v. *McCarl*, 62 F. (2d) 203 and *Noce* v. *Morgan Co.*, 106 F. (2d) 746, the money was to come from the United States Treasury. In *Miguel* v. *McCarl*, 291 U. S. 442 (1934), this Court said at p. 455-456:

> "The purpose of the suit was to control the action of the Chief of Finance, that is, to compel him to pay or cause to be paid the voucher in question. * * * the mandatory injunction to Coleman [Chief of Finance] should issue directing a disposal of petitioner's application for pay upon the merits, unaffected by the opinion of the Controller General, and in conformity with the views expressed in this opinion as to the proper interpretation and application of the pertinent statutes."

The test is not, we suggest, whether the funds come out of the United States Treasury, but whether the Court would be called upon, in order to grant relief, to require an appropriation by Congress, which is beyond the authority of the Court. *Robinson* v. *Deal*, 145 F. (2d) 382 (App.

D. C.) (1944). Cert. denied Feb. 26, 1945. Such is not the situation in the case at bar. We repeat, that if appellee is not enjoined, the property of appellant will be confiscated.

Conclusion

It is submitted that appellee has not shown any valid reason for sustaining the order of the Court below which should therefore be reversed and appellant afforded an opportunity of establishing its facts and presenting its constitutional arguments.

Respectfully submitted,

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